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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In re application of

Robert C. HOCHTRITT et al. Conf. 7665

Application No. 10/660,694 Group 1772

Filed September 12, 2003 Examiner A. S. Thomas

STACK OF INTERFOLDED ABSORBENT SHEET PRODUCTS

REPLY BRIEF

MAY IT PLEASE YOUR HONORS:

The Examiner's Answer of March 2, 2007 does not offer evidence or reasoning sufficient to support the obviousness rejection on appeal.

The gist of the Examiner's argument appears to be that it would have been obvious to use the Heath tissue in place of that of any of the three primary references, while preserving the configuration of the primary references, in order to obtain the beneficial properties of the Heath tissues in the configuration of the primary references.

The Examiner's Answer notes correctly that Heath refers broadly not only to bathroom tissue (aka toilet paper) but also to facial tissue and napkins, and does not dispute that the particular disclosure of the reference is directed primarily to bathroom tissue. However, the

Examiner's Answer does not address the fact that the broadest disclosure of Heath, including the very passages of the reference cited to support the disclosure of facial tissue and napkins, makes clear that the tissue of Heath is of a serpentine (e.g. rolled) configuration, presumably owing to the high bulk that characterizes the Heath tissue. See, for example, column 2, lines 27-30 and column 4, lines 48-53 of Heath. Nowhere does the reference disclose or otherwise indicate that the tissue is suitable for use in folded applications, much less an interfolded stack of sheets.

In the recent case of *KSR v. Teleflex*, the Supreme Court reaffirmed the longstanding proposition that an invention cannot be held to be obvious based solely on an allegation that it would have been "obvious to try" the claimed combination, absent "anticipated success." 2007 WL 1237837 at 4. The evidence of record indicates that such anticipated success would have been lacking in this case, where the secondary reference in its broadest terms describes its tissue as having a configuration distinct from and incompatible with that of the primary references.

Thus, when the Examiner asserts at page 5 of the Examiner's Answer that "there is no evidence of record to support the position that the single-ply product of the secondary reference is too bulky to be folded and

dispenses from an interleaved stack of sheet products," this assertion not only ignores the explicit and repeated teaching of Heath that its product is of a serpentine and not folded or interfolded configuration, but also seeks improperly to shift to applicant the burden on the issue.

The Examiner's improperly selective consideration of the Heath disclosure is not only improper, but also an indication that the obviousness determination has been based upon impermissible hindsight. The Supreme Court in *KSR v. Teleflex* also again emphasized that "[a] factfinder should be aware, of course, of the distortion caused by hindsight bias and must be cautious of arguments reliant upon *ex post* reasoning." 2007 WL 1237837 at 16.

Appellants note that the Examiner's Answer provides no response to Appellants' arguments in support of the independent patentability of dependent claims 18-20; therefore, whereas Appellants believe that the rejection on appeal should be reversed as to all of the claims on appeal, it is believed to be apparent that the rejection of claims 18-20 should be reversed even if the rejection of the other claims on appeal were to be affirmed.

The foregoing discussion is believed to underscore wherein the obviousness rejection on appeal is improper, even when considered in light of the guidance offered by the Supreme Court in the recent *KSR v. Teleflex* decision, and should therefore be reversed. Such action is accordingly respectfully requested.

Respectfully submitted,

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May 2, 2007